

SUMMARY ANALYSIS OF AMENDED BILL

Franchise Tax Board

Author: Hertzberg Analyst: Marion Mann DeJong Bill Number: AB 1392

Related Bills: See Legislative History Telephone: 845-6979 Amended Date: 05/13/1999

Attorney: Patrick Kusiak Sponsor:

SUBJECT: Action To Determine Validity Of Amount Of Tax

DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as introduced/amended _____.

AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.

AMENDMENTS DID NOT RESOLVE THE DEPARTMENT'S CONCERNS stated in the previous analysis of bill as introduced February 26, 1999.

FURTHER AMENDMENTS NECESSARY.

DEPARTMENT POSITION CHANGED TO _____.

REMAINDER OF PREVIOUS ANALYSIS OF BILL AS INTRODUCED February 26, 1999, STILL APPLIES.

OTHER - See comments below.

SUMMARY OF BILL

This bill would allow a taxpayer to bring an action to determine the validity of a tax, or other amount assessed by the Franchise Tax Board (FTB), by either paying the amount due or posting a bond to guarantee payment of the amount due.

This bill also would add corresponding provisions that would apply to the Board of Equalization (BOE).

SUMMARY OF AMENDMENT

The May 13, 1999, amendments did the following:

- added a provision to allow the BOE to require the plaintiff to increase the amount of the bond to guarantee additional interest accruing,
- deleted the requirements that the taxpayer file a statement with the Attorney General (AG) and that the AG approve the amount and terms of the bond,
- added a provision that prevents the assessment of a late payment penalty upon the disputed tax assessment with respect to which the bond is filed.
- made technical changes to restructure the code section.

The department's analysis of the bill as introduced February 26, 1999, still applies. A discussion of the bill as amended May 13, 1999, is provided below. The Legal Consideration, remaining Implementation Considerations, Technical Considerations and the Board Position are reiterated below. In addition, a new Implementation Consideration, Technical Consideration and Amendments (including updated amendments from the prior analysis) are provided below.

This analysis replaces the analysis of the bill as amended April 14, 1999.

Board Position:

<u> </u> S	<u> </u> NA	<u> </u> NP
<u> </u> SA	<u> </u> O	<u> </u> NAR
<u> </u> N	<u> </u> OUA	<u> X</u> PENDING

Department/Legislative Director Date

Johnnie Lou Rosas 6/15/1999

SPECIFIC FINDINGS

This bill would allow a taxpayer to bring an action to determine the validity of a tax or other amount assessed by the FTB. To bring an action, the taxpayer must either pay to FTB all amounts due (including interest and penalties with respect to the disputed assessment) or post a bond with FTB to guarantee payment of amounts reasonably expected to become due.

The bill would provide that the bond would not prevent the accrual of interest on the disputed amount. However, no penalty for late payment shall be assessed upon the disputed tax assessment with respect to which the bond is filed.

If during the time that the action is pending the court determines that the amount of the bond has become insufficient, the taxpayer must increase the amount of the bond to provide sufficient guarantee. In addition, the BOE may annually require the plaintiff to increase the amount of the bond to guarantee additional interest accruing during the year. The BOE must make the request to increase the bond in writing. The plaintiff would have at least 60 days from the date of the notice to increase the amount of the bond.

This bill would require the amount and terms of the bond and the sureties on the bond to be approved by the judge of the trial court hearing the action in accordance with limited portions of the Bond and Undertaking Law (Chapter 2 of the Code of Civil Procedure). The bill provides that approval should not be unreasonably withheld. If the bond is approved, no collection action on the tax or other assessed amount may be taken while the action is pending.

This bill would require the plaintiff (or the plaintiff's agent or attorney) to state under oath that payment was made or a bond was approved and filed.

This bill would apply to assessments made before, on or after the effective date of this bill, provided the tax period (statute of limitations for assessments) is still open. The bill would not authorize any action with respect to a claim where another provision or rule of law, including the doctrine of *res judicata*, bars an action on that claim. (The doctrine of *res judicata* has the effect of preventing a party to an action from re-litigating a case that has already been decided).

LEGAL CONSIDERATION

The provisions of this bill are susceptible to constitutional challenge since the California Constitution (Article XIII, Section 32) specifically provides that no legal or equitable process shall issue in any proceeding in any court to prevent or enjoin the collection of any tax. If a taxpayer posts a bond, rather than paying all amounts due, and brings an action, this bill would prevent collection while that action is pending. However, Legislative Counsel has recently opined that this bill would not violate Article XIII, Section 32.

IMPLEMENTATION CONSIDERATIONS

This bill would raise the following implementation considerations. Department staff is available to help the author resolve these concerns.

- It is unclear whether the prohibition from collecting while an action is pending would prevent the collection of subsequent assessments on the same tax year (e.g., assessments based on information received from the Internal Revenue Service).

- The bill requires the judge of the trial court to approve the amount, terms, and sureties on the bond to the state in accordance with Article 4 (commencing with Section 995.410) of the Code of Civil Procedure. However, terms and concepts within Article 4 (e.g., objection to a bond, sufficiency of a bond, withdrawal of sureties, cancellation of a bond, etc.) are described in other articles of Chapter 2 of the Code of Civil Procedure. For example, Article 8 (commencing with Section 995.810) addresses bonds to the State of California; Article 9 (commencing with Section 995.910) addresses objections to bonds; Article 10 (commencing with Section 996.010) addresses insufficient and excessive bonds; Article 12 (commencing with Section 996.210) addresses new, additional, and supplemental bonds; and Article 13 (commencing with Section 996.310) addresses the cancellation of a bond or the withdrawal of sureties. Consequently, the bill substantially departs from the Code of Civil Procedure rules (Bond and Undertaking Law) regarding bonds and undertakings. In addition, the bill supplies no procedure for the "judge of the court hearing the action" regarding the amount of the bond. Under the Code of Civil Procedure, the petitioner must post an undertaking of twice the amount of the money judgment to postpone the enforcement of a judgment. If a surety posts a bond, the amount of the bond must be one and a half times the amount of the money judgment.
- Since this bill would allow taxpayers to initiate a lawsuit by posting a bond rather than paying the full liability, more taxpayers may take their cases directly into court without adjudication before the BOE. This would result in increased litigation workloads.
- It is unclear what the provision prohibiting the assessment of late payment penalties upon the disputed tax assessment is intended to accomplish. The department does not assess late payment penalties on proposed deficiency assessments.
- It is unclear how the new provision allowing BOE (which should be FTB since FTB would administer this code section) to increase the bond amount interacts with the authority of the trial court or appellate court to increase the amount of the bond. Generally, the trial court or appellate court hearing a matter has the sole authority to make decisions concerning that matter. Arguably, the BOE (or FTB) would never have jurisdiction to adjust the amount of a bond since the bond would only be utilized in a court trial or appeal where the court would have exclusive jurisdiction concerning the sufficiency of the bond. As a result, the provision appears to have no effect.

TECHNICAL CONSIDERATIONS

Amendment 1 would replace BOE with FTB. The FTB is the agency responsible for administering the code in which this section is being added.

Amendment 2 would clarify that the bill applies to final assessments made before the effective date of this bill provided that action on the tax would not be barred by another provision or rule of law.

BOARD POSITION

Pending.

Marion Mann DeJong
845-6979
Patrick Kusiak

FRANCHISE TAX BOARD'S
PROPOSED AMENDMENTS TO AB 1392
As Amended May 13, 1999

AMENDMENT 1

On page 6, line 32, strikeout "State Board of Equalization" and
insert:

Franchise Tax Board

AMENDMENT 2

On page 7, delete lines 19 through 31, inclusive, and insert:

(e) This section shall apply to assessments that are final before, on or after the effective date of this act, but does not apply to any action regarding a final tax assessment that (without regard to this section) is barred by the operation of any law or rule of law, including res judicata, as of the effective date of the act adding this section.